FILE COPY

Office - Supreme Court, U. S
FILED
OCT 11 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 413.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PENNSYLVANIA GREYHOUND LINES, INC., AND GREYHOUND MANAGEMENT COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

IVAN BOWEN,
Rand Tower,
Minneapolis, Minnesota,
CHARLES H. YOUNG,
New Castle, Pennsylvania,
Attorneys for Respondents.

MORTIMER H. BOUTELLE,
Rand Tower,
Minneapolis, Minnesota,
Of Counsel.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

INDEX.

	Page
Statement	1
Argument	6
I. Jurisdiction of the National Labor Relations Board	6
II. The Judgment of the Circuit Court of Appeals in the Particulars Challenged Was Correct	10
Conclusion	17

CASES.

Crowell vs. Benson, 285 U. S. 22	8
Intermountain Rate Cases, 234 U. S. 476	16
Muskrat vs. United States, 219 U. S. 346	7
National Labor Relations Board vs. Jones & Laughlin Steel Corp., 301 U. S. 1	17
National Labor Relations Board vs. Pacific Greyhound Lines, Inc. (C. C. A. 9), July 16, 1937	17
Texas & N. O. R. Co. vs. Brotherhood, 281 U. S. 548	12
Virginian Ry. Co. vs. System Federation No. 40, 300 U. S. 515	17

STATUTES.

National Labor Relations Act, 49 Stat. 449, c. 372	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 413.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PENNSYLVANIA GREYHOUND LINES, INC., AND GREYHOUND MANAGEMENT COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The present petition seeks a review of a judgment of the Circuit Court of Appeals in the above entitled matter in so far as such judgment failed to approve and enforce an order of the National Labor Relations Board in particulars to be later considered. For their bearing on matters later presented, the consideration whereof should be decisive of a negative answer to the petition, a summary review of the proceedings is desirable.

STATEMENT

Jurisdiction on the part of the National Labor Relations Board was invoked through a charge filed by the so-called Local Division 1063 of the Amalgamated Association of

Street, Electric Railway & Motor Coach Employees of America, asserting that respondents had been guilty of certain unfair labor practices inhibited by the National Labor Relations Act (R. 3). Responsive to this charge, a complaint was issued by the Board, accompanied by a notice of hearing (R. 6).

At the hearing, respondents appeared and objected to the Board's jurisdiction on various grounds (R. 12), which were overruled and thereupon filed their answer, in which, amongst other things, it was specifically denied that respondents were employers or that the relation of master and servant existed between them, or either of them, and the several parties against whom the asserted unfair labor acts had been directed (R. 14, par. 8). The evidence before the Board disclosed that the respondent, Pennsylvania Greyhound Lines, Inc., was not an operating company (R. 330), on the contrary, that it was a holding company, owning the controlling interest in the stock of various operating subsidiaries toward which its sole relation was that of fiscal agent (R. 330).

The respondent, Greyhound Management Company, was not an operating company, on the contrary, its functions were limited to certain management details outside of those involved in the relations between employer and employee in the operating subsidiaries (R. 485, 486). One of the subsidiaries referred to, in connection with the conduct of whose business the charge and complaint of unfair labor practices arose, was engaged in the operation of a garage in the city of Pittsburgh, where the buses of one or more of the subsidiaries engaged in transportation were serviced and repaired and similar services rendered to outside persons and organizations (R. 330). At the close of the evidence by the Board, the respondents moved to dismiss the pro-

ceedings on several grounds, amongst which were lack of jurisdiction under the Act (R. 326).

The undisputed evidence further disclosed that some three years before the enactment of the Labor Relations Act, an organization of the employees of a number of the subsidiaries (including the operator of the garage in question) had been formed. The relations between the employers and the members of this organization were made the subject of the stereotyped form of attack resorted to in cases of this character with the resultant finding by the Board, in substance, that the employees' organization had been promoted by the employers which had rendered financial assistance, etc., and had largely controlled the organization's policies (R. 20).

The finding further determined that the employers had used coercion and intimidation in their efforts to compel the employees to affiliate themselves with the employees' organization and to refrain from becoming members of any other labor organization or union (R. 26).

The undisputed evidence disclosed that Local No. 1063 at the time the charge in its behalf was filed as well as at the date of the hearing, was in an embryonic state; that it had received its charter from the American Federation of Labor shortly before the charge was filed; that it was inspired by the activities of one of the employees of the garage operating unit who is named in the charter as its president; that the charter contemplated a completed organization with regularly elected officers and directors (R. 254); that at the date the charge was filed as well as that of the hearings, the organization had not been completed; that the only officers were the president already mentioned and one director (R. 260, 288); that applications for membership conditioned the applicant's payment of dues on the circumstance an agreement was negotiated with the oper-

ating employer (R. 173); and finally, that its membership was limited to a negligible number of the garage's employees.

In the circumstances last mentioned, the jurisdiction of the Board was challenged on argument before the Board as well as before the Circuit Court of Appeals on the ground that the proceedings had not been lawfully originated; that the charge was filed by an ostensible organization which had not passed the formative state; that there was no evidence of its authority to institute such proceedings or of its representative status as far as the members were concerned; and finally, that there was no showing of approval by its nominal membership of the proceedings instituted. To this last, the Board, notwithstanding the express provisions of the Act, replied that the charge was immaterial as the Board was authorized to issue a complaint on its own motion.

By reference to the proceedings before the Senate (S. 1958), it will be found that as introduced, the bill contained the following language, "whenever there is a charge *or the Board shall have reason to believe* that any person has engaged in or is engaging in any such unfair labor practice," the Board may issue a complaint. The language italicized was stricken from the Act in the form in which it was finally passed.

The Labor Board, as already indicated, resolved the various matters thus suggested against respondents with the result of issuing the order sought to be enforced through application to the Circuit Court of Appeals in the present proceeding. To complete the picture, the negative side has important bearing.

At the outset it should be noted that at the time the charge was filed with the Labor Board, no controversy had arisen with respect to rates of pay, hours of work or other features

incident to the usual relations between employer and employee. There had been no demand made on the operating subsidiary or the respondents for the recognition of any labor organization as the representative of the employees, or any part thereof, for purposes of collective bargaining. No demand of any kind had been made by or on behalf of Local No. 1063 nor any complaint lodged with the employer by that organization. The same conditions continued as of the date of the conclusion of the evidence before the Board and that of the issuance of the latter's order here involved.

At no time before or during the proceedings had any question of collective bargaining been raised and it is frankly conceded and emphasized in the pending petition filed on behalf of the Labor Board, that no issue of collective bargaining had been presented or considered. The record further discloses no complaint made by any individual employee on his own behalf respecting any incident of his employment. There had been no cessation or interruption of operations or the public service rendered by the operators. Harmony prevailed between the employees and their employer except in so far as that harmony may be assumed to have been interrupted by the agitation inspired by a negligible number of those employees in the manner and under the circumstances already alluded to.

Out of the conditions thus indicated grew the extended and complicated procedure before the Labor Board disclosed by the present record.

ARGUMENT

I.

Jurisdiction of the National Labor Relations Board.

From matters already alluded to it will have been observed that two serious questions respecting the jurisdiction of the Labor Board were presented in the present proceedings, viz.: (a) The lack of authoritative representative status on the part of the organization by which the original charge was filed; and (b) that the relation of employer and employee did not exist between the respondents and those on whose ostensible behalf the charge was filed which resulted in the complaint issued by the Labor Board.

If it shall be asserted that respondents are not in position to raise these questions in the circumstance that they have taken no steps to review the decision of the Circuit Court of Appeals, the answer will immediately suggest itself. The entire record of the proceedings is before this Court and if, as here contended, it conclusively appears that the proceedings were inaugurated without jurisdiction, it should require no argument to demonstrate that the result should have an important bearing in determining the propriety of granting the discretionary relief invoked by the pending petition.

A. The Board's authority to issue a complaint in the present proceedings necessarily turns on the terms of the Labor Relations Act.

Section 10(b) of the Act provides that "whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice" the Board "shall have power to issue" a complaint.

The National Labor Relations Board is "quasi-judicial in

character" as regards complaints and hearings, and its character as such is stressed in the reports of the Senate and House Committees (S. Report No. 573; H. R. Report 1147) and in the "Statement of the Managers on the Part of the House" of the Conference Report (H. R. Report 1371).

Such being the character of the Board, in order to give it jurisdiction in a proceeding under Section 8 of the Act, the only section under which the respondents were charged or complained against, there must have been a "charge" by a competent party. The federal judiciary has only jurisdiction in "cases" or "controversies" under Article III, Section 2 of the Constitution. A "case" or "controversy" under this Article is one between parties in interest in a judicial sense.

Muskrat vs. United States, 219 U. S. 346.

Section 8 of the Act relates to "Rights of Employees." As was stated in the Senate Report on the bill (p. 7):

> "This definition does not mean that the Government could intervene in a 'dispute' between an employer and let us say, a critical college professor; for jurisdiction, under this bill depends upon the charge of an unfair labor practice affecting commerce, and there could be no such practice involving the employer and the college professor."

Unlike the Interstate Commerce Commission and the Federal Trade Commission, the Board was not authorized to initiate proceedings on its own motion. As heretofore indicated, the provision in the Act as introduced in the Senate (S. 1958) authorizing the Board to proceed on its own initiative, was stricken from the Act as finally passed.

The rights in the instant case charged as having been violated, were "Rights of Employees" under the Act.

If it is contended that Local No. 1063 acted as the representative or agent of the "employees," attention may be called to the fact, already commented on, that there is no allegation in the charge or in the complaint, or evidence in the Record sustaining any such representative status.

B. The finding of the Board to the effect that the relation of employer and employee existed between respondents and those whose rights were assumed to have been violated is not controlling. The relation thus postulated is jurisdictional and the courts are not concluded by a finding of an administrative body thereon.

The decision of this Court in *Crowell vs. Benson,* 285 U. S. 22, is decisive on this feature of the case. It is only necessary to include a brief extract from the opinion of Chief Justice Hughes in that case:

> "What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme. * * * These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (Sec. 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions."
>
> * * * * * * * * *
>
> "In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute and, in the

absence of any other justification, underlies the constitutionality of this enactment. If the person injured was not an employee of the person sought to be held, * * * there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates.

* * * It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend."

Neither of the questions thus suggested were considered by the Circuit Court of Appeals in the judgment here sought to be reviewed but their existence is clearly disclosed by the record. Assuming the correctness of the contentions of lack of jurisdiction in the inception of the proceedings the latter can hardly be regarded as of more than moot character and in asserting the right to more complete relief than that affirmatively granted by the judgment of the Circuit Court of Appeals, we think the answer should be found in the circumstance the Board has already received more relief than that to which it was entitled and should be satisfied accordingly.

II.

The Judgment of the Circuit Court of Appeals in the Particulars Challenged Was Correct.

In approaching the terms of the judgment of the court which are here challenged and sought to be reviewed, we are confronted with two separate questions, the first of which necessarily turns on the authority of the Labor Board under the Act, and second, on the nature of the jurisdiction conferred on the courts under the Act's terms.

The provisions of the Labor Board's order which are not here in question were of the customary sweeping and drastic character. These were supplemented by what are here referred to as Subdivisions (c) and (d) of paragraph 4 as follows:

> "(c) Withdraw all recognition from the Employees' Association of the Pennsylvania Greyhound Lines, Inc., as representative of their employees, including the employees of the Pennsylvania Greyhound System, for the purpose of dealing with respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work;
>
> (d) Post notices in conspicuous places in all of the places of business wherein their employees, including employees of the Pennsylvania Greyhound System, are engaged, stating that said Association is so disestablished and that respondents will refrain from any such recognition thereof;"

It is broadly asserted by petitioner that the right to incorporate the last two quoted provisions is indispensable in the exercise of the authority conferred on the Board by

the Act's terms. In this connection stress is laid on the language of Subdivision (c) of Section 10 of the Act, as follows:

> "(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

If the interpretation of this language is as broad as that indicated by the argument of petitioner, it means nothing less than that absolute and arbitrary dictatorial power is lodged with the Board with no restraint on its exercise provided the exercise of that power is, in its opinion, calculated to carry out the purposes of the Act. The results of the exercise of a power as broad as thus assumed, are too clear to require detailed comment. Whether the delegation of any such power would render the Act illegal needs not be here considered. The salient and determinative feature in the pending case would appear to be found in the circumstance that there was no question *of the recognition of any representative* for collective bargaining in the present proceedings. The employer had done no act or taken any step indicative of its intention to recognize the existing employees' organization as such sole representative. It had in nowise refused to recognize Local No. 1063 for the quite obvious reason that that organization, as already indicated, had taken no steps to obtain recognition by the

employer for any purpose whatsoever. At the time the latter filed its charge with the Labor Board its existence, from a practical standpoint, was little more than potential.

Furthermore, no action had been had or taken by the Board to determine or certify the authorized representative of the employees for the purpose of collective bargaining.

What was intended, and all that was intended by the Board in the provisions challenged was obviously to coerce the employees into submitting their fortunes to the mercies of an outside union or organization, or, as the alternative, to risk the loss of their collective rights.

If we assume that the main purpose of the Act was to sanction the free and uninterrupted exercise of the rights of employees without restraint, intimidation or coercion, it would seem that the Act should work both ways and that the results in this regard should not be subjected to arbitrary interference by the Board.

It is argued, however, that the Circuit Court of Appeals, in refusing to enforce these provisions, disregarded the rule established in *Texas & N. O. R. Co. vs. Brotherhood,* 281 U. S. 548, the ruling in which case is assumed to have provided the pattern for the draftsmen of the Labor Relations Act.

In the almost innumerable controversies which have arisen respecting the Act in question, so much stress and so many claims have been postulated of the ruling in this case that it may not be out of place to briefly summarize the situation therein presented.

The case arose under the 1926 Amendment to the Transportation Act of 1920. The "Brotherhood" had been recognized by the railroad as the representative of its clerical employees. Negotiations had been carried on between the

Brotherhood and the railway respecting various incidents of the employment. One of these involved a demand for an increase in pay which had been refused by the railway whereupon the Brotherhood invoked the aid of the Board of Mediation. While proceedings under the latter application were pending the railway inaugurated the organization of what for brevity may be termed a company union and incidentally sought to coerce its employees into joining that organization and to refrain from joining the Brotherhood. These conditions gave rise to a bill filed by the Brotherhood to enjoin the continuation of such intimidation and coercion; to require the railway to restore the *status quo* as far as the Brotherhood's representative status was concerned; and to enjoin the railway from interfering with or coercing the members of the Brotherhood.

The suit resulted in an injunction, the terms of which were qualified by the following pertinent language:

> "Nothing in this injunction shall be considered or construed as authority to prevent any employee of said defendant Railroad Company, in the class referred to, from organizing, joining, promoting, or fostering as many unions as he or they (meaning such employees in the class referred to) may desire, and in any way which he or they may desire, and with the assistance and aid of any of his fellow employees in any way and to any extent that said fellow employees (in the class referred to) may desire; * * *"

The case as presented to the appellate courts grew out of an order adjudging the railway in contempt for violation of the injunction's terms and requiring the railway in order to purge itself of contempt, to disestablish the company union as the representative of its employees and restore the

Brotherhood to its previous representative status. The substance of the order appears in the opinion of this Court and need not, therefore, be more fully detailed.

When it is considered that, in the present case, there was no question of representative authority and that no steps had been taken by the Labor Board to designate the representative for the purpose of collective bargaining, the distinction between the case cited and the situation here presented requires no comment.

Nothing in the present case disclosed that the organization of the employees had ever assumed or exercised any such representative power as that provided by the Act's terms or as the "sole representative" for the purpose of collective bargaining. Nothing in the record disclosed that the employees' organization had ever assumed to represent or act on behalf of anyone other than its members or to assert any such exclusive rights as that ascribed to the status of the representative for the purposes of collective bargaining by the terms of the Act.

The terms of the Labor Board's order here in question required the company to deny all recognition to the employees' organization, thus effecting the latter's practical dissolution, a result naively if not specifically admitted in the present petition at page ten. As confirmatory of the conclusions thus reached, allusion may be made to the following features.

1. The Employees' Association was a labor organization within the definitions in the Act's terms (Section 2(5)). The findings of the Board in the pending proceedings recognize the status thus indicated as well as the fact that the creation of the organization antedated the passage of the Labor Relations Act by several years (R. 21). In these

circumstances the provisions of the Labor Board's order under review should be contrasted with the conceded circumstance that no question of collective bargaining was involved in the pending proceedings.

2. The Employees' Association, having the status last mentioned, was legally entitled to designate the representative of its members without restraint or coercion. Conversely stated, the correlative right was legally vested in the employer. The injunctive provisions of the Labor Board's order here in question constituted an illegal violation of the rights of both.

3. The sections of the Labor Relations Act dealing with the question of employees' representation are included in Section 8 (5) and Section 9 (a), (b) and (c). Nothing in the complaint or order of the Labor Board pretends to invoke any of these provisions in the instant case.

4. It being conceded in the pending petition that no question of representation was involved, the injunctive provisions of the Labor Board's order here in question were obviously premature as aimed at nothing more than the question of the employees' representation. Furthermore, the terms of the order in the respects under consideration were arbitrary and uncalled-for when considered in the light of the existing situation.

In considering the question dealing with the authority of the Circuit Courts of Appeals under the Act's terms, the argument of petitioner assumes that the judicial functions are limited to those of an ordinary court of error and appeal. Jurisdiction is conferred by Section 10 (e) of the Act which authorizes the Board to apply to the court for a decree enforcing orders made by it. After reciting that

the court may grant temporary relief and for hearings on the merits, the section includes the following:

> "* * * and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

The jurisdiction thus contemplated is not essentially different from that provided in other cases of administrative bodies. The general scope of such jurisdiction was stated by Chief Justice White in *Intermountain Rate Cases*, 234 U. S. 476, 490-491:

> "It is of course true as pointed out in *Interstate Commerce Commission vs. Illinois Central Railroad*, 215 U. S. 452, 470, and since repeatedly applied that findings of fact made by the Commission within the scope of its administrative duties must be accepted in case of judicial review, but that doctrine, as was also pointed out, does not relieve the courts in a proper case from determining whether the Constitution has been violated or whether statutory powers conferred have been transcended or have been exercised in such an arbitrary way as to amount to the exertion of authority not given, doctrines which but express the elementary principle that an investiture of a public body with discretion does not imply the right to abuse but on the contrary carries with it as a necessary incident the command that the limits of a sound discretion be not transcended which by necessary implication carries with it the existence of judicial power to correct wrongs done by such excess."

Applying the rules thus stated we think the court in the instant case was entirely within the limits of its discretionary power in striking out and excluding so much of the order as it considered unjustified by the conditions presented in the record and as arbitrary and unreasonable.

CONCLUSION

In support of its contentions on the present application it is broadly asserted by the Labor Board that the decision of the Circuit Court of Appeals in the features sought to be reviewed conflicts with the decisions of this Court in *Virginian Ry. Co. vs. System Federation No. 40,* 300 U. S. 515, and *National Labor Relations Board vs. Jones & Laughlin Steel Corp.,* 301 U. S. 1. The contention is untenable.

In the former of these cases the Mediation Board had designated and certified under the terms of the amended Railway Labor Act, the sole representative of the employees for the purposes of collective bargaining. The order of the court was addressed at compelling recognition of the steps thus taken by the Mediation Board by enjoining the recognition of any other representative of the employees than that designated and certified for that purpose. In the second of the cases cited the question with which we are here concerned was not involved.

It may be stated in conclusion that the decision of the Circuit Court of Appeals of the Ninth Circuit in *National Labor Relations Board vs. Pacific Greyhound Lines, Inc.,* rendered July 16, 1937, and not yet reported, reached the same conclusion as that reached by the Circuit Court of Appeals of the Third Circuit in the pending proceedings, with respect to the same injunctive features of the Labor Board's order here sought to be enforced.

For the reasons herein stated it is submitted that the petition for certiorari should be denied.

Respectfully submitted,

IVAN BOWEN,
Rand Tower,
Minneapolis, Minnesota,
CHARLES H. YOUNG,
New Castle, Pennsylvania,
Attorneys for Respondents.

MORTIMER H. BOUTELLE,
Rand Tower,
Minneapolis, Minnesota,
Of Counsel.